STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Whitbeck, C.J., Griffin and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No. 123760

TARAJEE SHAHEER MAYNOR
Defendant-Appellee.

Lower Court No: 02-185279- FC
COA NO. 244435

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

President
Charles Sherman

Michael E. Duggan
Prosecuting Attorney
County of Wayne

Timothy A. Baughman
Chief, Research, Training
and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

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Statement of the Question

I.

To do an act with an intent to cause a particular harm requires an instruction or a finding that it was the conscious object of the defendant to obtain that result. To knowingly or intentionally do an act or cause a result requires an instruction or a finding that the act was done or the result caused volitionally. Given that child abuse in the first degree requires only that the defendant knowingly or intentionally cause a certain result, is it required that obtaining the particular result have been the conscious object of the defendant?

Defendant answers "YES"

Amicus answers "NO"

Statement of Facts

Amicus joins in the statement of facts of the People of the State of Michigan.

Argument

I.

To do an act with an intent to cause a particular harm requires an instruction or a finding that it was the conscious object of the defendant to obtain that result. To knowingly or intentionally do an act or cause a result requires an instruction or a finding that the act was done or the result caused volitionally. Because child abuse in the first degree requires only that the defendant knowingly or intentionally cause a certain result, it is not required that obtaining the particular result have been the conscious object of the defendant.

A. Introduction: The Task

Almost two decades ago this court added its voice to the chorus of discontent regarding the "general intent-specific intent dichotomy," finding it at once illogical and incongruous.[1] But the court was unpersuaded to modify what it saw as the common-law rule, leaving that question to "an appropriate case in the future," and appealing instead for assistance from the legislature, assistance that has not been forthcoming.[2] Only recently this court revealed its continuing dissatisfaction with the law concerning *mens rea*–perhaps better stated as the various mental states required for criminal culpability–when it issued an order granting leave, "limited to the issue whether third-degree child abuse, MCL

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[1] *People* v *Langworthy*, 416 Mich 630 (1982).

[2] 416 Mich at 641-642.

750.136b(5) is a specific intent crime."[3] But after briefing and argument the court did not reach the question on which leave had been granted, affirming the conviction for third-degree child abuse instead on the ground that "there was sufficient evidence to convict defendant of third-degree child abuse regardless of whether the statute requires general or specific intent."[4] The Court of Appeals has now, in the present case, maintained its position that a statute prohibiting "knowingly or intentionally caus[ing] serious physical or mental harm to a child" requires proof of a specific intent to cause that harm. And this court has granted leave on a slightly different question than the leave grant in *Sherman-Huffman*; that is, whether it "is sufficient to instruct the jury using the statutory language regarding intent...or whether it also is necessary to instruct the jury regarding 'specific intent.'" But the question, amicus submits, is unavoidable–are offenses that prohibit "knowingly or intentionally" causing a particular result offenses that require proof that the defendant specifically intended that the prohibited result occur?

In considering this question it must also be kept firmly in mind, as Chief Justice Rehnquist observed for the United States Supreme Court some years ago, that the administration of our system of criminal justice is "confided to ordinary mortals." Should litigants, scholars, or courts "become obsessed with hair-splitting distinctions, either traditional or novel, that [the legislature] neither stated nor implied when it made the conduct

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[3] *People v. Sherman-Huffman,* 463 Mich 979 (2001).

[4] *People v. Sherman-Huffman*, 466 Mich 39, 40 (2002).

criminal," then our system of justice "could easily fall of its own weight."[5] The point is to render construction and analysis more logical and understandable, not to further confuse it; the game must be worth the candle.[6]

With these cautions in mind, the issue in this case is the mental state required for culpability for first-degree child abuse in a somewhat unusual context, for this is not a case involving intoxication (and voluntary intoxication is, by statute, no longer a defense in any event), but one concerned solely with the manner in which the jury should be instructed on the statutory elements of the offense. It is out of the ordinary because the specific intent/general intent question almost always arises in an attempt to ascertain whether voluntary intoxication will at least mitigate the level of the offender's culpability. And there is a very good reason why this is so–the specific intent/general intent distinction was invented precisely to deal with the problem of intoxication. Though this is not an intoxication case, some discussion of that defense is necessary, amicus believes, to understand how the law got where it is, and what can be done about it.[7]

B. <u>Intoxication, and the Genesis of the Specific Intent/General Intent Distinction</u>

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[5] *Bailey*, at 633.

[6] See e.e *Cope* v *Heltsley*, 128 F3d 452, 458 (CA 6, 1997).

[7] As well put by Justice Holmes, "a page of history is worth a volume of logic." *New York Trust Co.* v *Eisner*, 256 US 345, 349, 41 S Ct 506, 507, 65 L Ed 963 (1921). And see MCL 768.37, abrogating the defense of voluntary intoxication to a specific intent crime in Michigan.

"Specific intent" and "general intent" are not legislative terms of art; no statute employs these terms to express the mental state required for criminal culpability. They were invented by common-law courts to deal with the problem of voluntary intoxication, to ameliorate the rule–which came to be viewed as harsh–that voluntary intoxication did not excuse or mitigate any crime.[8] Blackstone wrote that intoxication, rather than excusing or mitigating conduct, instead was "an aggravation of the offence."[9] Well into the nineteenth century the rule was the same in this country; as Justice Story put it, "[d]runkenness is a gross vice, and in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity."[10] And the concept of *mens rea* was not unknown to the law at this time; rather, Blackstone, Hale, and other writers explained that the common-law rule was simply that one who was intoxicated voluntarily was taken as a matter of law to have the same judgment as one "in his right senses."[11]

But the law began slowly to change, and the beginning of the change was an 1819 English case, where Justice Holroyd said that though intoxication is not an excuse for crime, where, as in a charge of murder, a material matter of proof is premeditation, as opposed to

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[8] Layton, "Comment, No More Excuses: Closing the Door on the Voluntary Intoxication Defense," 30 J. Marshall L Rev 535, 553-554 (1997).

[9] 4 Blackstone, *Commentaries*, 25-26. See also 1 Hale, *Pleas of the Crown*, 32-33.

[10] *United States* v *Cornell*, 25 F Cas 650, 657-658 (No 14, 868) (CC R.I. 1820).

[11] See e.g. 1 Hale, at 32.

sudden heat and impulse, "the fact of the party being intoxicated [is] a circumstance proper to be taken into consideration."[12] The change was slow, for within 16 years it was said that Holroyd had recanted, and that "there is no doubt that that case is not the law."[13] But something like Holroyd's formulation eventually carried the day in most jurisdictions, so that intoxication could be considered in determining whether a defendant was *capable* of forming the "specific intent" necessary to the offense.[14]

Michigan was not outside the mainstream. When a defendant in a murder prosecution requested an instruction that he should be acquitted if so intoxicated as to be "unconscious of what he was doing at the time of the commission of the offense," no less than Justice Cooley pronounced the claim an "alarming one to admit in the criminal jurisprudence of the country"; rather, "[a] man who voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule."[15] Two years later through Justice Christiancy–in a prosecution for assault with intent to murder–the court, though finding its earlier pronouncement correct, distinguished a crime where the prohibition was not only as to an act, but an act with an intent to achieve a particular result. In such a case, said the court, it is material to "inquire whether the

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[12] 1 W Russell, *Crimes and Misdemeanors* 8, citing *King* v *Grindley*, Worcester Sum Assizes 1819, MS).

[13] *King* v *Carroll*, 143 Eng Rep 64, 65 (N.P. 1835).

[14] Hall, "Intoxication and Criminal Responsibility," 57 Harv L Rev 1045, 1049 (1944).

[15] *People* v *Garbutt;* 17 Mich 9, 19 (1868).

defendant's mental faculties were so far overcome by the effect of intoxication, as to render him *incapable* of entertaining the intent," though it is not necessary to show that the defendant was capable of "appreciating the moral qualities of his actions, or of any intended result, as being right or wrong."[16] This was the law in Michigan under the legislature acted.[17]

A brief–and scarcely exhaustive–review of some crimes for which intoxication was at least a mitigating circumstance and some for which it was not is instructive:

Intoxication not a defense	**Intoxication a defense**
Second degree murder: *knowingly* creating a very high degree of risk or death or great bodily harm *knowing* that death or such harm would be the likely result.	First degree murder: intent to kill
Criminal sexual conduct: engaging in sexual conduct/contact....	Assault with intent: intent to commit murder or great bodily harm
Carrying a concealed weapon: shall not carry....	Felonious assault: intent to injure or put in fear
Unlawfully taking and using an auto: takes without authority	Breaking and entering with intent: to commit a felony
Resisting and obstructing: *knowingly and wilfully* obstruct, resist or oppose....	Armed robbery/larceny: intent to permanently deprive
Discharge of a firearm in an occupied structure: *intentionally* discharges a firearm	Possession of firearm with intent to use unlawfully against another: intent to use unlawfully
Delivery of a controlled substance	Possession with intent to distribute: intent to distribute
Bringing liquor into correctional facility: shall not bring...	Placing explosives with intent to destroy: intent to destroy or injure

[16] *Roberts* v *People*, 19 Mich 400, 418-419 (1870).

[17] *People* v *Savoie*, 419 Mich 118 (1984), overruling *People* v *Crittle*, 390 Mich 367 (1973).

The intoxication defense thus has been found applicable with regard to conduct where the actor maintains an *intent to achieve some further consequence* through that act–a criminal intent to achieve a result beyond the act done.[18] English courts refer to this as "ulterior intent"; if a statute describes as criminal certain conduct undertaken with an intent to do a further act or to achieve a particular consequence, then the crime has an ulterior intent. The phrase is a useful, descriptive one. Assault with intent to kill is an example of an offense with an "ulterior intent."[19]

C. Statutory Expressions and Case Law Expressions of Levels of Mental Culpability

Statutory and common-law expressions of the levels of mental culpability required for various offenses[20] are:

- no expression at all, so that a level of mental culpability must be implied;
- to intentionally do an act;
- to wilfully do an act;
- to knowingly do an act;

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[18] *People* v *Henry*, 239 Mich App 140 (1999); *People v Langworthy*, supra; *People* v *Jensen*, 231 Mich App 439 (1998); *United States* v *Jackson*, 213 F3d 1269 (CA 10, 2000); *United States* v *Maganellis*, 864 F2d 528 (CA 7, 1988).

[19] Carter, "Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse," 64 Miss L Rev 383, 406 (1999).

[20] Amicus is speaking here only to those mental states ordinarily encompassed in the general intent/specific intent formulations; negligence and gross negligence (recklessness) are not, amicus believes, pertinent to the inquiry here.

- to do an act intending some particular consequence;
- to do an act knowing that a particular consequence will result;
- to intentionally cause some harm;
- to knowingly cause some harm.

Case law construction of these mental states is set out in the following table:

Level of mental culpability	**Case-law definitions**	**Specific/ general**
No expression at all, so that a level of mental culpability must be implied.	Act must be ordinarily be intentional in the sense of voluntary; not accidental.	General intent
To intentionally do an act.	Act must be voluntary; not accidental.	General intent
To wilfully do an act.	Act must be done with knowledge that the conduct is unlawful; need not be aware of specific rule or law.	General intent
To knowingly do an act.	Act must be voluntary; not accident–with knowledge of the facts that constitute the offense, but not that the conduct was unlawful.	General intent
To do an act intending some particular consequence.	Act must be voluntary; not an accident–and defendant must intend to achieve a further consequence as a result of the act.	Specific intent
To intentionally cause some harm.	Act causing the harm must be voluntary; not accidental.	General intent Law unclear
To knowingly cause some harm.	Act causing the harm must be voluntary; not accidental.	General intent Law unclear

Intentionally or knowingly do an act: case decisions establish that for statutes that are either silent with regard to intent, or refer to "knowingly" or "intentionally" doing an act–such as "intentionally discharging a firearm" in an occupied structure–the intent required is simply *to do the physical act*, so that the act was not done accidentally, even if that "accident" was the result of recklessness.[21] "The knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law."[22]

Wilfully doing an act: case decisions establish that for statutes that require that act be done "wilfully," it is required that the defendant have not only the intent to do the act, but

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[21] See *People v Henry*, supra (1999); *United States* v *Blair*, 54 F3d 639 (CA 10,1995)("knowing" use of wire communication facilities to take bets); *People* v *Maleski*, 220 Mich App 518 (1996)(delivery of a controlled substance a general intent crime); *People* v *Norman*, 176 Mich App 271 (1989) (possession of liquor in prison a general intent crime); *People* v *Laur*, 128 Mich App 453 (1983) (unlawfully taking and using a vehicle requires knowledge of lack of authority; "no intent is required beyond that to do the act itself"); *People* v *Watts*, 133 Mich App 80 (1984)(receiving and concealing stolen property knowing it was stolen is a general intent crime); *People* v *Karst*, 133 Mich App 413 (1984) ("knowledge" requirement is "simply to prevent innocent acts from constituting crimes, is general intent); *United States* v *Deleveaux*, 205 F3d 1292 (CA 11, 2000)(felon in possession of firearm requires knowing possession of a firearm, which simply requires proof of knowledge of facts that constitute the offense, not knowledge those facts violate the law or any intent to violate the law); *United States v Maganellis*, supra (intentionally distributing cocaine requires only intent to do the act, and is a general intent crime).

See also *United States* v *Bailey*, 444 US 394, 100 S Ct 624, 62 L Ed 2d 575 (1980)("'knowledge' corresponds loosely with the concept of general intent").

[22] *Bryan* v *United States*, 524 US 184, 118 S Ct 1939, 141 L Ed 2d 147 (1998), quoting Justice Jackson.

also the knowledge that the act is unlawful.[23] A "wilful" act is a general intent crime, under traditional analysis.[24]

Doing an act with the intent to cause a particular harm or result: case decisions establish that statutes that proscribe the doing of an act "with the intent to" cause a particular harm or result require proof of a conscious desire to accomplish that result (without regard to the likelihood of its occurrence).[25] As mentioned earlier, this is referred to in the English cases as "ulterior intent"–the intent to achieve some consequence beyond the doing of the physical act prohibited. These offenses are, of course, viewed in Michigan, as in most places, as "specific intent" crimes, to which intoxication is a defense.

Where the law is even less certain concerns crimes that do not make it an offense to "intentionally" or "knowingly," or even "wilfully" do an act, and also do not make it an offense to do an act "with intent to" cause a specific consequence, but instead make it an offense to "knowingly" or "wilfully" **cause a certain harm**, without regard to the act that causes it. Rather than, for example, prohibiting an assault–an act–done with the "intent to cause great bodily harm," some few statutes prohibit directly the causing of a specified harm. The child abuse statute is such a statute; the legislature has not prohibited doing some act

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[23] See *Bryan v United States*, supra.

[24] See *United States* v *Gutierrez-Gonzales*, 184 F3d 1160 (CA 10, 1999); *United States* v *Doe*, 136 F3d 631 (CA 9, 1998).

[25] *United States v Bailey*, supra; *People v Jensen*, supra ("specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is defined as merely the intent to perform the physical act itself"); *People v Langworthy*, supra.

knowingly or intentionally, and it has not prohibited doing some act "with the intent" to cause some specified harm, but instead has prohibited "knowingly or intentionally" causing serious physical or mental harm to a child, in the case of child abuse in the first degree.

This statutory language evinces a legislative concern with the harm *caused*–and that it not be accidental or even reckless, for purposes of these two provisions–and not with the subjective intent of the person causing the harm. Just as an act done "knowingly" or "intentionally" requires a showing only of intent to do the physical act, not knowledge of its wrongfulness or intent to act wrongfully, so knowingly or intentionally causing a specified harm should require no more than an intent to do *whatever* act caused the specified harm; again, that the harm not be caused as the result of an act that is accidental or even reckless. Only when an act is specified, and the legislature requires that in order to be culpable, the actor, when committing that act, must intend a certain consequence–that is, consciously desire it to occur–can it be said that the crime is one of what today is known as specific intent.[26]

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[26] And see e.g. *State v Chapman*, 572 SE2d 243 (2002) (statute defining offense as "intentionally inflicting any serious bodily injury to the child": held, "the State is not required to prove that the defendant specifically intended that the injury be serious....felonious child abuse does not require the State to prove any specific intent on the part of the accused"); *King v Wyoming*, 40 P3d 700 (Wyoming, 2002)(child abuse statute, prohibiting a person from "intentionally" inflicting physical or mental injury upon a child, "is a general intent crime, containing no requirement that the accused intend any further act or future consequence....").

D. Conclusion

In its grant of leave this court asked whether it is sufficient to instruct in the language of the statute itself–knowingly or intentionally caused serious physical or mental harm–with no further explication. There is surely ample case law that ordinarily an instruction which repeats the language of the statute is sufficient on the elements.[27] But in these matters often the issue drawn will not be whether the act that caused the harm was intentional or accidental, but whether the defendant, in doing the act intentionally, subjectively desired the harm that resulted. And so the parties, and the jury, must know whether the crime charged requires proof of this "ulterior intent."

The matter before the court is one of organization and categorization, in an attempt to delineate more clearly the mental states of culpability required by the legislature for various crimes, for the court has no role other than discovering the legislature's purpose. Specific intent and general intent are not legislative terms, and thus this court is free to turn to some other organizing principle or principles, if it is thought that to do so brings some degree of clarity to a confused and confusing area of the law. Previously, this court has banned use of the word "malice" in discussion of the elements of murder, for the term is not statutory, but part of the common law. In so doing, the court did not purport to change the

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[27] "It has been repeatedly stated that a charge which includes a reading of the information and the applicable statutes will generally be found to be sufficiently comprehensive. People v. Kruper, 340 Mich. 114, 64 N.W.2d 629 (1954); People v. Murry, 59 Mich.App. 555, 229 N.W.2d 845 (1975); People v. Wheat, 55 Mich.App. 559, 223 N.W.2d 73 (1974); People v. Fry, 55 Mich.App. 18, 222 N.W.2d 14 (1974); People v. Cardenas, 21 Mich.App. 636, 176 N.W.2d 447 (1970)." *People v. McGhee,* 67 Mich App 12, 16 (1976).

understood meaning of the common-law term, adopted into law by the legislative use of the common-law term "murder" without alteration, but opted to refer to that meaning directly rather than by the general term–malice–which, because it has other generally understood meanings than that meant in the law of homicide, is confusing.[28]

Commentators and cases have for many years–as mentioned previously–decried the confusing nature of the specific intent/general intent dichotomy. Amicus suggests that application of a different organizing principle for the various mental states of culpability *is* an idea whose time has come. "Specific intent" causes confusion because it can be applied equally both to the doing of an act and the doing of an act with the conscious desire to cause a specified result. Because "specific intent" fails to focus attention on the conscious desire to cause a specified result, amicus suggests it be abandoned in favor of the term "ulterior intent," as used by the British, or some similar term that plainly suggests the focus is not on the "intent" to do the *act*, but on the conscious desire to *cause* a particular *result*. In the present case, where the offense is described as "knowingly or intentionally" causing serious physical injury, there is no "ulterior intent" required beyond causing the harm specified, and the jury should be instructed the prosecution need *not* prove that causing that harm was the defendant's conscious object. The Court of Appeals has in effect held that the defendant must have subjectively desired that the prohibited result would occur. For the reasons stated above, amicus submits that this is mistaken. The harm must have been caused "intentionally

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[28] *People* v *Woods*, 416 Mich 581 (1982).

or knowingly" in the same sense that one must "intentionally discharge a firearm in an occupied structure"; that is, it must not have been accidental or even reckless, but volitional.

Amicus suggests, then, the following organizational principles for the states of mental culpability for offenses in Michigan–laying aside, for purposes here, a discuss of reckless and negligent conduct offenses:

- **ULTERIOR INTENT**: where the offense requires that the defendant have committed some *act* "with the intent to" cause a specified consequence–such as great bodily harm, death, permanent deprivation of property (larceny)–then that result or consequence must have been the conscious object of the defendant when engaging in the act. Intoxication is a defense to these offenses.

- **WILFUL ACT**: where the offense requires that the defendant have committed some act "wilfully" then the defendant must have acted volitionally–that is, not accidentally or even recklessly–with knowledge that the conduct is unlawful, though he or she need not be aware of the specific law or rule that his or her conduct is violating.[29] There is no requirement of proof of a "conscious object" of the defendant when engaging in the act, and intoxication is a not defense to these offenses.

- **KNOWING OR INTENTIONAL ACT:** where the offense requires that the defendant have committed some act "knowingly" or "intentionally," then the defendant must have acted volitionally–that is, not accidentally or even recklessly–but there is no requirement that the prosecution prove that he or she acted with knowledge that the conduct was unlawful. There

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[29] See *Bryan v United States,* supra.

is no requirement of proof of a "conscious object" of the defendant when engaging in the act, and intoxication is a not defense to these offenses.[30]

- **KNOWINGLY OR INTENTIONALLY CAUSING A SPECIFIED RESULT**: where the statute requires not that the defendant do an act with the intent to cause a specified result, but simply that the defendant knowingly or intentionally cause that result–from whatever act–then the defendant must have acted volitionally–that is, not accidentally or even recklessly–but there is no requirement of proof of a "conscious object" of the defendant that the consequence or result occur, and intoxication is a not defense to these offenses.

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[30] Michigan law is currently confused in this area: several cases have held that an act that must be committed "knowingly" is a specific intent crime. See *People* v *Premen*, 210 Mich App 211 (1995), precedential effect removed, 450 Mich 951 (1995); *People* v *American Medical Centers*, 118 Mich App 135 (1982).

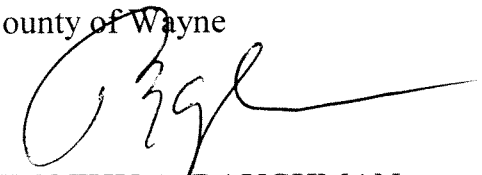
Relief

Wherefore, amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

Charles Sherman
President
Prosecuting Attorneys Association
of Michigan

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research, Training,
And Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792